

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

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77-2146

FEB 21 1978

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Freddie R. Moore

Petitioner-Appellant

VS.

Peter Preiser, Commissioner State Department
of Correction, Leon J. Vincent, Superintendent
Greenhaven Correctional Facility, Lieutenant Sietz
and Officer Sullivan, Dr. P.J. Manning chief
resident dentist, Greenhaven, Dr. H.L. Rhodes,
resident dentist at Greenhaven, Dr. Seimen, resident
dentist at Greenhaven, Dr. Franks, chief resident
physician at Greenhaven.

Respondents-Appellees.

77-Civ-2146

Notice of Motion For
Permission
To Appeal as a Poor Person

Honorable Sirs:

Please Take Notice!

That upon the annexed affidavit and petition of Freddie R. Moore, the
petitioner-appellant, above named, will move this Court on the
day of February 1978, or as soon thereafter as this Motion can be
heard for permission to appeal, as a poor person pursuant to Title
28 U.S.C. 1915, the Orders, of the U.S. District Court, Southern Dis-
trict of New York, dismissing plaintiff's Complaint in its

PAGINATION AS IN ORIGINAL COPY

entirety).

That said Orders, was entered respectively in this action on October 15th 1974 and August 4th 1977. Dismissing the Complaint in its entirety).

That jurisdiction is Conferred on this Court by Title 28 U.S. C. Section 1291.

DATED: FEBRUARY 1978

Respectfully Submitted
Freddie Moore
Appellant Pro Se.
G.P.O. Box 255
New York 10001, N.Y.

3
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Freddie R. Moore

Petitioner-Appellant

vs.

Peter Preiser, et al.

Respondents-Appellees.

77 Civil 2146

Affidavit of Verification
Poverty and Service

STATE OF NEW YORK

COUNTY OF NEW YORK

Freddie R. Moore, being duly Sworn deposes and Says:

That he is the petitioner-appellant above named, and that he has read the following statements concerning his poverty and the failure to serve papers properly because of his poverty.

That he has read the attached petition and knows the contents thereof and that the contents and statements are true to his knowledge and belief.

That he is a citizen of the United States and over the age of 21.

That he is a poor person without an income, and is unable (due to his poverty) to prosecute this action in the mode prescribe by law, and believes that he is entitled to Redress.

That he has no funds to print his appeal brief, in the regular manner, and makes this affidavit pursuant, to Title 28 U.S.C. § 1915.

That good Cause exists for granting appellant permission to appeal as a poor person, in that he is being denied his Constitutional and Federal Rights, by state officials - That he is being deprived of the provisions of the Eighth, and Fourteenth Amendments of the U.S. Constitution.

That on the date noted below he served Eight (8) copies of the instant papers on the U.S. Court of Appeals: Second Circuit, N.Y. 10007, N.Y. and a copy on the Atty. Gen. Louis J. Lefkowitz, Two World Trade Center, N.Y. 10047, N.Y. And by sending first class Mail to the above mentioned addresses.

Sworn To before me this

day of February 1978

Signed:

Notary Public

Respectfully Submitted

Freddie R. Moore

Appellant Pro Se,

G.P.O. Box 255

N.Y.C. 10001, N.Y.

(4)

Motion For Permission To Appeal
As a Poor Person

This is a Motion by the petitioner-appellant for permission to appeal on typewritten or handwritten papers, in the Forma Pauperis, from the Orders of the U.S. District Court Southern District of New York. That said Orders, was entered respectively in this Action on October 15th 1974, and August 4th 1977, dismissing the Complaint in its entirety. This Appeal is sought pursuant to, Title 28 U.S.C. § 1915.

Statement of Prior Proceedings

By petition Verified June 10th 1974, Plaintiff petitioned the U.S. District Court, Southern District of New York, for a Civil Rights Action under Title 28 U.S.C. §§ 1983, 1985. By Orders dated Oct. 15th 1974, and Aug. 4th 1977 Plaintiff's Complaint was dismissed in its entirety. Thereafter, and on Sept. 6th 1977, petitioner filed a timely Notice of Appeal in the Forma Pauperis.

Statement of Facts

Freddie R. Moore, petitioner-appellant above named, duly sworn, deposes and says: That the Orders of the Court, below was not consistent with the Eighth and Fourteenth Amendments to the U.S. Constitution. Section 1983, by its terms protects, all "rights that are secured by the Constitution and laws" of the U.S. The Eighth Amendment is made applicable to the States, by the Fourteenth Amendment see, Robinson v. California 370 U.S. 660 (1962) Also see Bishop v. Stoneman 508 F. 2d 1224 (2d cir. 1974). At issue in this case is the denial of the rights of Plaintiff to receive adequate medical and dental care, at Greed Haven, caused by illegal and unauthorized conduct and practices by defendants in the operation of the Hospital at Greed Haven. And this constitutes the "unnecessary and wanton infliction of pain, which your petitioner-appellant was subjected to, by these state officials, acting under the colors of state law.

Gregg v. Georgia 428 U.S. 153, 169-173 (1976) see, Also, Todaro v. Ward, No 337 Sept. Term 1977

Argued Oct. 6th 1977 Decided Oct. 31st 1977 (U.S. Court of Appeals Second Circuit) see Also, Cruz v. Ward, 558 F.2d 658, 662 (2d Cir 1977)

Since proper Dental and Medical care is a Constitutionally protected right for inmates, the Court below was in error to dismiss petitioner's Civil Rights action, and said dismissal was a legal stamp upon the unlawful act being applied to deprive plaintiff of his Constitutional Rights.

That the failure of the N.Y. State Department of Correctional Service to provide sufficient Dental and Medical care and afford your petitioner his basic elements of adequate medical care constitutes a willful and intentional violation of the rights of your plaintiff's guaranteed under the 8th + 14th Amendments. Further, the intentional refusal by Correction Officers to allow your petitioner-appellant access to medical personnel and to provide prescribed medicines, and other treatment, is cruel and unusual punishment in violation of the U.S. Constitution. See, Estelle v. Gamble, 429 U.S. 97 104 1976 see Also Finley v. Arkansas Board of Correction, 505 F.2d 194 (8th Cir 1974). Gates v. Collier, 501 F.2d 129 (5th Cir. 1974) Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972)

Conclusion

Wherefore, and in view of the above Contentions, I, Freddie R. Moore, petitioner-appellant being destitute, respectfully prays that this Honorable Court, will grant petitioner permission to appeal in Forma Pauperis on type written or hand-written papers, and for such other and further relief as justice requires.

DATED: NEW YORK NEW YORK Respectfully Submitted
FEBRUARY 10 - 1978 *Freddie R. Moore*

Isaac Postar 4/10/78

ISAAC POSTAR
NOTARY PUBLIC, State of New York
No. 00-9518306
Qualified in Bronx County
Commission Expires March 30, 1979

Appellant Pro Se,
G.P.O. Box 255
New York 10001, N.Y.

Received on November 1st 1974
10:00 P.M.
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Office of the Clerk
United States Court House,
Foley Square
New York, N.Y. 10007

FREDDIE MOORE
DRAWER
STORMVILLE N.Y. 12582

Date ~~xxxx~~ Nov 1, 1974

Title: MOORE -v- PREISER

Packet Number: Pro Se-74 civ 2732

Decision dated: Oct 18, 1974 and Oct 15, 1974

Judge KAFFPP

Sir:

There is enclosed herewith, copy of decision
filed and entered in the above-entitled proceeding.

C.C.
LOUIS B. LEFKOWITZ
ATTORNEY GENERAL
STATE OF NEW YORK
TWO WORLD TRADE CENTER
NEW YORK, N.Y. 10047
Attn Ralph McMurtry

Very truly yours,

RAYMOND F. BURGHARDT
Clerk

by: N. Joel Blum
Deputy Pro Se Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FILED
OCT 22 1974
U.S.D. OF N.Y.

-----x
FREDDIE R. MOORE,
:
Plaintiff,
:
- against -
:
PETER PREISER, et al.,
:
Defendants.
:
-----x

MEMORANDUM AND ORDER

Pro Se 74 Civ. 2782

KNAPP, D.J.

Plaintiff pro se, pursuant to Rule 56 of the Federal Rules of Civil Procedure, has moved for summary judgment as to all eight defendants in this case. On October 15, 1974, this court dismissed Moore's complaint with respect to five of the eight defendants named in the suit. As to the remaining three defendants - Lt. Seitz, Officer Sullivan, and Superintendent Vincent - plaintiff's motion for summary judgment must be denied. There are genuine issues of material fact which still must be resolved, and which cannot be resolved without a hearing.

SO ORDERED.

MICROFILM

OCT 23 1974

Dated: New York, New York

October 18, 1974.

WHITMAN KNAPP, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Office of the Clerk
United States Court House,
Foley Square
New York, N.Y. 10007

FREDDIE MOORE
DRAWER B
STORMVILLE N.Y. 12582

Date ~~xxxx~~ Nov 1, 1974

Title: MOORE -v- PREISER

Pocket Number: Pro Se 74 civ 2732

Decision dated: Oct 18, 1974 and Oct 15, 1974

Judge KIAPPP

Sir:

There is enclosed herewith, copy of decision
filed and entered in the above-entitled proceeding.

C.C.
LOUIS B. LEFKOWITZ
ATTORNEY GENERAL
STATE OF NEW YORK
TWO WORLD TRADE CENTER
NEW YORK, N.Y. 10047
Attn Ralph McMurtry

Very truly yours,

RAYMOND F. BURGHARDT
Clerk

by: N. Joel Blum
Deputy Pro Se Clerk

Handwritten: Memo. Decision & Order

Handwritten signature
JUL 21 2 28 PM '73
S.D.N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

FREDDIE R. MOORE, :

Plaintiff, :

- against - :

PETER PREISER, Commissioner Department :
of Corrections, LEON J. VINCENT, :
Superintendent Greenhaven Correctional :
Facility, Lieutenant SEITZ and Officer :
SULLIVAN, DR. P. J. MANNING, Chief :
Resident Dentist, Greenhaven, DR. :
H. L. RHODES, Resident Dentist at :
Greenhaven, DR. SEIMEN, Resident Den- :
tist at Greenhaven, DR. FRANKIS, :
Resident Physician at Greenhaven, :

Defendants. :

-----x

MEMORANDUM AND ORDER

74 Civ. 2732

Handwritten: #41335

A P P E A R A N C E S :

FREDDIE MOORE, Pro Se Plaintiff
Drawer B
Stormville, New York 12532

LOUIS J. LEFKOWITZ
Attorney General of the State of New York
Attorney for Defendants
Two World Trade Center
New York, New York 10047
By: RALPH L. McTERRY
Of Counsel

BRIDGE, D.C.

This is a civil rights action brought by plaintiff, presently confined in Green Haven Correctional Facility. Plaintiff alleges that his constitutional rights were violated by allegedly inadequate medical and dental care provided at Green Haven between March 19th and May 20th, 1974. He also claims that certain of the defendants made racial slurs about him, and that one of the defendants threatened to punish him for instituting this legal action. Plaintiff seeks declaratory and injunctive relief and damages amounting to \$20,000 as against each defendant.

All eight defendants have moved to dismiss the complaint for failure to state a claim on which relief can be granted. Although the complaint is purportedly based upon 42 U.S.C. §§1981-1985, fairly construed it invokes 42 U.S.C. §1983 and must be so analyzed for purposes of defendants' motion to dismiss.

The standard for determining motions to dismiss in cases like the one at bar has been carefully set forth by the Supreme Court. In Haines v. Kerner (1972) 404 U.S. 519, 92 S. Ct. 594, 30 L. Ed. 2d 652, the court stated that a prisoner's petition, no matter how inartfully drafted, should not be dismissed unless it appeared beyond doubt that the plaintiff could prove no set of facts in support of his claim which would entitle him to the relief sought. Thus, it is

purposes of this motion, to accept all his allegations as true.

For the purposes of simplification, the allegations against each of the defendants will be considered separately.

A. Defendant Manning

Defendant Manning is the chief resident dentist at Green Haven. Plaintiff's allegations against Dr. Manning are (1) that Dr. Manning gave plaintiff penicillin on April 25, 1974 for a toothache and swelling, swollen gums; (2) that on April 29, 1974, Dr. Manning told plaintiff to return to his office tomorrow; (3) that on April 30, 1974, Dr. Manning took an x-ray of plaintiff's lower front jawbone; (4) that on May 1, 1974, defendant extracted five teeth from plaintiff's mouth, put three stitches in plaintiff's gums, put plaintiff on a soft diet and told plaintiff to continue to wear his dentures; (5) that on May 2, 1974, Dr. Manning suggested that plaintiff remove his denture plates; (6) that on May 3, 1974 Dr. Manning removed the stitches from plaintiff's gums; (7) that on May 6, 1974, defendant extracted plaintiff's last two front teeth and put three stitches in plaintiff's gums; (8) that on May 8, 1974, Dr. Manning removed the stitches from plaintiff's gum, told plaintiff to return to a soft diet, and suggested that he return in two weeks for work on his dentures; and (9) that Dr. Manning was present when Dr. Seimen performed some work on plaintiff's

filling left in plaintiff's gum after the extraction of a tooth on May 6th.

It seems apparent that plaintiff's allegations concerning improper dental care on the part of Dr. Manning do not state a cause of action under 42 U.S.C. § 83. In questions of this nature, the scope of authority of a federal court is very narrow:

"It is confined to determining whether the medical treatment of the prisoner is so shocking as to constitute a denial of due process prohibited by the Fourteenth Amendment or a cruel and unusual punishment forbidden by the Eighth Amendment, selectively incorporated into the Fourteenth." Startz v. Cullen (2d Cir. 1972) 468 F.2d 560.

The allegations against Dr. Manning certainly do not suggest conduct that "shocks the conscience" or conduct that could be characterized as a "barbarous act." See Church v. Hegstrom (2d Cir. 1969) 416 F.2d 449. Even if the allegations do rise to the level of negligence, it is well settled in this Circuit, that "allegations of mere negligence in the treatment of a prisoner's physical condition, or claims based on differences of opinion over matters of medical judgment, fail to rise to the level of a §1983 violation." Corby v. Conboy (2d Cir. 1972) 457 F.2d 251. See, also, United States ex rel Hyde v. McGinnis (2d Cir. 1970) 429 F.2d 864. There can be no possible interpretation of plaintiff's contentions which suggest that Dr. Manning displayed

a deliberate and callous indifference to the dental needs of plaintiff so that a §1983 action could lie. See Martinez v. Mancusi (2d Cir. 1970) 443 F.2d 921 cert. denied 401 U.S. 983.

Finally, Dr. Manning is accused of making a racial slur against plaintiff (Complaint, para. 9(r)). This claim also must be dismissed. Even if true, such a claim would not involve a deprivation of a constitutional right. Rosenberg v. Martin (2d Cir. 1973) 478 F.2d 520 cert. den. 414 U.S. 872; Schumate v. People of State of New York (S.D.N.Y. 1974) 373 F. Supp. 1106. As the Second Circuit observed in Johnson v. Glick (1973) 481 F.2d 1028, cert. den. 414 U.S. 1033 "not every push or shove . . . violates a prisoner's constitutional rights."

Accordingly, the complaint against Manning must be dismissed in all respects.

B. Defendant Rhodes

Defendant Rhodes is a dentist at Green Haven. He is mentioned twice in plaintiff's complaint. First, plaintiff claims that Rhodes made the same racial slur as did defendant Manning. For the reasons stated in Section A, this claim must be dismissed for failure to state a cause of action under §1983.

Secondly, Rhodes is mentioned in a sentence in paragraph

7(1), which reads: "If Dr. Rhodes had adequately put proper filling in my teeth, I may have saved my teeth." The allegation does not state when or under what circumstances these fillings were made. At best the claim is one of negligence, which does not suffice under §1983. Church v. Hegstrom, supra, 416 F.2d 449; Corby v. Conboy, supra, 457 F.2d 251.

✓ Accordingly, the complaint against Rhodes must be dismissed in all respects.

C. Defendant Franks

Defendant Franks is a physician at Green Haven. In paragraph 9(r), plaintiff alleges that the defendant made a racial slur about him. As stated above, this allegation does not rise to the level of a §1983 violation.

The other allegation against this defendant occurs in paragraph 9(p) of the complaint. Plaintiff alleges that officer Sullivan told plaintiff that Dr. Franks had forbade plaintiff to eat on the diet.

Even if this were true, this allegation alone would not meet the criterion set forth in Church v. Hegstrom, supra, 416 F.2d 449, and United States ex rel Hyde v. McGinnis, supra, 429 F.2d 864, for stating a valid claim under §1983. Here, there is no flagrant

indifference to a serious physical disability of the type and degree alleged in Martinez v. Magallon, supra, 443 F.2d 921.

Accordingly, the complaint must be dismissed against defendant Franks in all respects.

D. Defendant Seimen

Defendant Seimen is a dentist at Green Haven. Plaintiff's allegations against defendant are (1) that on March 19, Dr. Seimen took an x-ray of plaintiff's upper jawbone after plaintiff came to his office to complain of a broken tooth in his mouth. (Although plaintiff claims the tooth broke because of an inadequate filling, he does not say who was responsible or when the tooth was filled); (2) that on March 20, 1974 Dr. Seimen tried to drill out the half tooth with a hammer, and failing to do so employed the service of an untrained inmate who also used the hammer; eventually, Dr. Seimen removed the half tooth, extracted two other front teeth and put four stitches in plaintiff's gums; (3) that on March 25, Dr. Seimen removed the stitches from plaintiff's gums; (4) that on May 10, 1974 Dr. Seimen examined and worked on plaintiff's gums without an anesthetic; and (5) that on information and belief Dr. Seimen uttered the same racial slur made by defendants Manning, Rhodes, Seitz, Franks and Sullivan.

The allegations against Dr. Seimen do not rise to the level of a cause of action under §1983. At best, the second allegation

can be construed as a claim of negligence. As stated above, however, such an allegation would not meet the standards set forth in Church v. Hagstrom, supra, 416 F.2d 449. The fourth allegation, liberally construed, might state a claim of negligence or a disagreement over Dr. Seimen's medical judgment. It does not state a claim under §1983. The complaint indicates that Dr. Seimen stopped removing the particles when plaintiff told him that it was much too painful.

As to the allegation concerning the racial slur, it is clear that such a statement doesnot involve a deprivation of constitutional rights under 42 U.S.C. §1983.

Accordingly, the complaint against Dr. Seimen should be dismissed.

E. Defendant Seitz

Lieutenant Seitz is an employee of the Department of Correction at Green Haven. The allegations against him are (1) that on two occasions, Seitz, as head of the Adjustment Committee, dismissed charges against plaintiff about his being out of place at the mess hall; (2) that Seitz made a racial slur against plaintiff; and (3) that Seitz threatened to punish plaintiff for taking legal action and to punish other prisoners who filed affidavits on behalf of plaintiff (Complaint, para. 13).

The first two allegations obviously do not state a claim under 42 U.S.C. §1983. The last allegation, however, which is not referred to in the State Attorney General's Motion to Dismiss, does state a viable claim under 42 U.S.C. §1983. It may well turn out that plaintiff will be unable to prove this contention, but at this stage, we must accept plaintiff's allegations as true. Prisoners have a constitutional right of access to the courts, and prison authorities may neither place obstacles in front of nor punish the exercise of that right. Corby v. Conboy, supra, 457 F.2d 251.

Accordingly, the motion to dismiss the complaint against Lieutenant Seitz must be denied.

F. Defendant Sullivan

Defendant Sullivan is a correction officer at Green Haven. The allegations against him are (1) that on May 12, defendant told plaintiff that his name had been removed from the soft diet list, and that despite plaintiff's statement that Dr. Manning had given permission, he was keeplocked for being out of place in the Mess Hall; (2) that on May 16, 1974, the defendant again told plaintiff that he was not on the diet and ordered him keeplocked for being out of place; (3) that on May 16, 17, 18, 19, plaintiff, while keeplocked, did not receive anything to eat from the diet at dinnertime; and that on May 19, 1974, plaintiff was told that Sullivan had thrown plaintiff's diet food out; and (4) that Sullivan had made racial slurs against

defendant.

Although the latter allegation does not state a cause of action under 42 U.S.C. §1983, we feel that plaintiff has stated a borderline claim in allegations 1-3. If he can show deliberate indifference to his medical needs by defendant Sullivan, he could fit within the standards enunciated in Martinez v. Mancusi, supra, 443 F.2d 921. Accordingly, the motion to dismiss must be denied.

G. Defendant Vincent

Defendant Vincent is the Superintendent of Green Haven. The only allegations in the complaint against him are that (1) on information and belief Vincent has encouraged his staff to "get tough" with plaintiff, and (2) that Vincent maintains the conditions described in plaintiff's complaint.

Although these allegations are somewhat conclusory, on a charitable reading, the complaint does indicate that the defendant authorized the behavior of Correction Officials Seitz and Sullivan, thus meeting the requirement that the complaint show some personal responsibility of the defendant for the §1983 violations. See Johnson v. Glick, supra, 481 F.2d 1028. We feel that it is necessary to allow plaintiff an opportunity to develop further facts which would implicate defendant Vincent. Accordingly, the motion to dismiss is denied.

II. Defendant Preiser

Defendant Preiser is the State Commissioner of Corrections. The only allegations in the complaint against him are (1) that he knew or should have known of defendant Vincent's "get tough" policy; and (2) that he has failed to end the practices mentioned in the complaint.

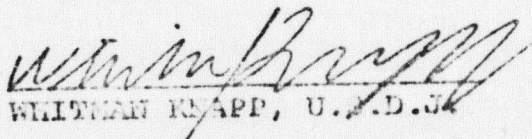
As stated above, the rule in this circuit is that when monetary damages are sought under §1983, the general doctrine of respondeat superior does not suffice, and a showing of some personal responsibility of the defendant is required. Johnson v. Glick, supra, 481 F.2d 1028. Even on a charitable reading, this complaint does not allege more than that Preiser should be responsible for whatever occurs at Green Raven. Accordingly, defendant's motion to dismiss is granted.

In sum, defendants' motions to dismiss are granted in part and denied in part. The dismissals of the causes of action are made without prejudice to plaintiff's right to file an amended complaint.

IT IS SO ORDERED.

Dated: New York, New York

October 15, 1974.


WHITMAN KNAPP, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FREDDIE R. MOORE,

Plaintiff,

vs.
Defendants:

PETER FANOSER, Commissioner
Department of Corrections,
LEON J. VINCIGU, Superintendent
Greenhaven Correctional Facility,
Lieutenant SPURZ and Officer
SULLIVAN, DR. P. J. MANNING,
Chief Resident Dentist, Green-
haven, DR. H. L. MOORE,
Resident Dentist at Greenhaven,
DR. SEISEN, Resident Dentist at
Greenhaven, DR. FRANKIS, Resi-
dent Physician at Greenhaven,

Defendants.

MEMORANDUM AND ORDER

14 Civ. 2132

NDNY, D.D.

The defendants have moved to dismiss the amended
complaint^{1/} pursuant to Rule 12(b) of the Federal Rules of Civil
Procedure. In October, 1974, we considered a similar motion
and granted it in part, dismissing the complaint as to five of
the eight defendants, but without prejudice to plaintiff's right
to file an amended complaint. In the new complaint plaintiff
essentially realleges his original grievances against all eight
defendants, supplementing with specific facts none of his
previously stated allegations. He now dismisses the complaint
in its entirety.

Plaintiff, Freddie R. Moore, formerly an inmate at the
Green Haven Correctional Facility, brought this civil rights
action complaining of the dental and medical care he received

at the prison. He asserts that the prison dentists failed to treat an abscessed tooth properly so that eventually several teeth had to be extracted and that they were insensitive to his pain; that various prison personnel refused to provide him with the special diet which the condition of his teeth required and that in fact they subjected him to disciplinary action for attempting to obtain that diet; that one prison official threatened to retaliate if plaintiff should complain of his actions; and that high level prison officials encouraged or condoned the unconstitutional actions of their subordinates. Since the details of these claims are described in our opinion of October 15, 1974, we do not repeat them here. Plaintiff asks for declaratory and injunctive relief and \$20,000 damages against each defendant.^{2/}

With respect to the dental and medical personnel, Drs. Manning, Rhodes, Seaton, and Franks, we dismissed the original complaint on the ground that the allegations of improper professional care did not rise to the constitutional level applicable in the federal courts under the civil rights act.^{3/} We also held that the racial slurs allegedly uttered by the prison doctors did not constitute constitutional deprivations. We adhere to those conclusions. Although plaintiff has made more specific his allegations against defendant doctors in the amended complaint, the allegations -- even if fully substantiated -- contain no more than an accusation of negligence which is insufficient to state a claim under the civil rights act. We now hold we pleaded against the other doctors, and accordingly

to dismiss the complaint as to all four of them.

We dismissed the original complaint against defendant Freiser, the State Commissioner of Corrections, on the ground that there were no allegations indicating personal responsibility or awareness of plaintiff's situation on his part. Johnson v. Eltek (2d Cir. 1973) 481 F.2d 1028. The amended complaint contains no additional specific allegations against Commissioner Freiser and it must again be dismissed as to him.

We originally sustained the complaint as against defendant Vincent, Superintendent of Green Haven, believing that plaintiff was entitled to an opportunity to develop facts to prove his general claim that Superintendent Vincent had instituted a "get tough" policy against himself. In the amended complaint plaintiff has specified his grievance against Superintendent Vincent and in doing so has revealed that this claim as well does not arise to a constitutional level. Plaintiff complains that, in response to an inquiry by his mother, Superintendent Vincent informed her that he had relied on the opinion of his professional staff concerning the plaintiff's treatment, and that he did not consider it necessary to consult her regarding her adult son. At the same time Superintendent Vincent allegedly informed plaintiff's mother that plaintiff's recent conduct at the institution had been unsatisfactory, and that he was using a disciplinary procedure in connection with the disciplinary. Stated out in this way plaintiff's claim against Superintendent Vincent is not sufficient to state a claim under the civil rights act.

With respect to defendant Seitz plaintiff has amended his complaint to protest the several days he was kept in keeplock, allegedly only for being in the wrong mess hall line while seeking to obtain the special diet; in the original complaint he protested the release from keeplock rather than the confinement itself and we dismissed that portion of his claim. There is, however, in the amended complaint no allegation that plaintiff was deprived of the due process requirements applicable to prison disciplinary proceedings, and we can not, of course, second guess the decisions of prison officials made in the course of such properly conducted proceedings. Plaintiff has not alleged any improper motive on the part of Seitz that could make the administrative decision to place him in keeplock otherwise suspect, and we conclude that this portion of the complaint must again be dismissed.

We did sustain plaintiff's original complaint that Seitz threatened to retaliate if plaintiff filed affidavits explaining of Seitz's conduct. However, the amended complaint gives no indication that the threats in any way hampered plaintiff's access to the court or ever were carried out in the least. Accordingly, we now dismiss the entire complaint as against defendant Seitz.

With respect to Correctional Officer Sullivan, we originally held his "borderline" behavior constituted which required a more lenient approach for plaintiff's special needs. Plaintiff now is alleging to the contrary. Defense counsel points out, however, that part of the complaint accuses

Sullivan of acting on the instructions of Dr. Franks for which he can hardly be faulted. The second part of plaintiff's complaint against Sullivan alleges that another officer had told plaintiff that defendant Sullivan had "threwn plaintiff's diet feed out" on three occasions. Plaintiff alleges no motive for this act. We can hardly find that the failure to provide a special diet on no more than three occasions^{4/} can be construed as a deprivation of constitutional rights. Therefore, we now dismiss the complaint against Sullivan.

We do not believe that an opportunity for further argument is appropriate,^{5/} and accordingly dismiss the complaint in its entirety. We direct the clerk to enter an order dismissing the complaint and terminating the case.

SO ORDERED.

Dated: New York, N.Y.

August 4, 1977

WILLIAM FRAPP, D.J.

FOOTNOTES

- 1/ Plaintiff neglected to file his amended complaint. Defendants, however, have filed an answer, and we therefore deem the amended complaint filed and transmit to the clerk the duplicate copy furnished to us by the defendants.
- 2/ Plaintiff asked for money damages in the original complaint but not in the amended.
- 3/ The Supreme Court has recently affirmed the applicable standard in *Estelle v. Gamble*, _____ U.S. _____, 45 L.W. 1623 (Nov. 30, 1976).
- 4/ The amended complaint refers to four successive evenings but the original complaint makes it clear that on one of those evenings plaintiff did receive food.
- 5/ Before this motion was filed, discovery had been completed under the supervision of Magistrate Bernlow. In his opposition to the motion plaintiff gave no indication of having uncovered facts which would supplement his pleading.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
FREDDIE R. MOORE,

Plaintiff,

- against -

PETER PREISER, etc.,

Defendant.
-----x

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MEMORANDUM AND ORDER

74 Civ. 2732

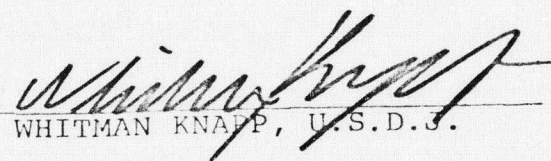
KNAPP, D.J.

We construe the pro se plaintiff's notice of appeal and affidavit of service as a motion for an extension of the time within which he may appeal. We grant the motion under F.R.A.P. 4(a). No further notice or service is required.

SO ORDERED.

Dated: New York, New York

October 12, 1977.


WHITMAN KNAPP, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
FREDDIE R. MOORE,

Plaintiff,

- against -

PETER PREISER, etc.,

Defendant.
-----x

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MEMORANDUM AND ORDER

74 Civ. 2732

KNAPP, D.J.

Motion for leave to proceed on appeal in forma
pauperis is granted.

SO ORDERED.

Dated: New York, New York

October 27, 1977.

WHITMAN KNAPP

WHITMAN KNAPP, U.S.D.J.